



September 30, 1992

Ms. Evelyn E. Small  
Mays & Valentine  
1111 East Main Street  
P.O. Box 1122  
Richmond, Virginia 23208-1120

**92-19A**  
ERISA SECTION  
3(1),3(4)

Dear Ms. Small:

This is in reply to your letter requesting an advisory opinion regarding the status of the benefit program maintained by the Police Benevolent Association of Richmond, Virginia (Association) under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you seek an opinion from the Department of Labor (Department) that the Association is not an "employee organization" within the meaning of section 3(4) of ERISA or, if the Department is unable to reach such a conclusion, that the Association's program of benefits is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA and not an "employee pension benefit plan" within the meaning of section 3(2) of ERISA.

Your correspondence contains the following facts and representations. The Association was formed in 1898 to encourage long-term, honorable service with the City of Richmond Bureau of Police (Bureau) by providing certain supplemental payments to its members who are police officers following their retirement and death benefits to their dependents. The purpose of the Association, as expressed in the Second Restated Articles of Incorporation of the Association (Articles of Incorporation), is to:

... accumulate a fund, the income from which will be used to provide pensions and funeral expenses for the maintenance, support and welfare of active members of the [Association] who are retired from the Bureau of Police of the City of Richmond, Virginia, after honorable service, because of sickness or wounds not caused by their own immoral conduct, or who, after a minimum of twenty years as active members of the [Association], retire from the said Bureau of Police, after honorable service therein, either voluntarily or involuntarily...

The Articles of Incorporation provide for three classes of members designated as Life Members, Contributing Members, and Active Members, whose qualifications and voting rights are as follows:

1. Life Members are those persons who are elected as such by the Board of Directors and who contribute to the Association the sum of \$25.00. Life Members do not have the right to vote on any matters brought before the membership of the Association, but are eligible to serve as full voting members of the Board of Directors.
2. Contributing Members are those persons who are elected as such by the Board of Directors and who contribute to the Association the sum of \$5.00 annually. Contributing Members have no right to vote on any matter brought before the membership of the Association, but are eligible to serve as full voting members of the Board of Directors.
3. Active Members are persons who are members of the regular police force of the City of Richmond, Virginia, who are elected by the Board of Directors to become members of the Association when in good health and under the age of thirty-five years, and who pay the dues prescribed by the Association's bylaws (Bylaws). Active Members of the Association are entitled to the exclusive vote on all matters brought before the membership of the Association and are eligible to serve as full voting members of the Board of Directors.

You represent that the Association no longer has Life Members. In operation, the Life Member category has been incorporated into the Contributing Member category and Life Member certificates have not been issued since the 1920's. You also represent that, while the Articles of Incorporation and Bylaws provide for the election of new members, elections were not held after the 1920's. An individual may become a Contributing Member of the Association merely by making the required \$5.00 annual contribution and become an Active Member upon the payment of "dues" of \$36.00 per year and satisfaction of eligibility requirements.<sup>1</sup>

The Association provides three types of benefits to Active Members or their beneficiaries: pension benefits, death benefits, and payments to defray the cost of funeral expenses. Although the Association's Contributing Members financially contribute to the Association, they do not receive Association benefits. Only police officers who are Active Members of the Association are eligible to receive benefits. Monthly pension benefits are provided to Active Members who are retiring from the Bureau either voluntarily or involuntarily after a minimum of 20 years of continuous membership in the Association and honorable service to the Bureau or who are retiring because of sickness, wounds or other injuries not caused by the member's immoral conduct, regardless of years of service or Association membership. Benefit payments are made for the remaining life of the Active Member or until the Association no longer pays benefits to any Active Member, whichever is earlier. The amount of the pension benefit is determined solely by a formula involving the number of recipients in a given year and the level of fund income, not by the length of service or age of the recipient.<sup>2</sup> Under the Bylaws, the Association may discontinue benefits where the pensioner has been found by the Board of Directors to have brought "disgrace upon himself or his family" or is failing for any reason, including mental incapacity, to use the payments "for the necessary support of those persons for whose support he is legally liable"

Death benefits are provided to an Active Member's spouse, next of kin or personal representative (beneficiary). The beneficiary is entitled to receive a death benefit each month for a period of eighteen months equal to the monthly pension benefit which the pensioner (i.e. an Active Member receiving benefit payments) would have received during the same period had he or she lived, less the number of months during which the pensioner had received pension benefits prior to his or her death. In the event that an Active Member dies before he or she has begun to receive benefits, his or her beneficiary is entitled to receive monthly, for a period of eighteen months following his or her death, the amount of benefits to which the deceased member would have been entitled had he or she been on the pension roll. This benefit is payable regardless of the deceased Active Member's length of service or Association membership, so long as his or her service was honorable and his or her death was not caused by his or her own immoral conduct. The pension and death benefits are provided from the income the Association derives from dividends, interest, capital gain income, any gifts or bequests made to the Association, and membership dues.' Generally, 70% of the Association's dues income is derived from the dues of Contributing Members. You advise that the Association does not derive income from the City of Richmond or any other employer.

The Association maintains a separate fund to provide payments to defray the cost of funeral expenses upon the death of an Active Member, a pensioner, or the spouse of either. The fund was created and is maintained by assessments made from time to time upon all Active Members. Only the Association's Active Members, who periodically set the amount of the benefit, contribute to the fund. The first assessment appears to have been made in 1976. The Association's Bylaws require that on occasions where the funeral expense fund is reduced to a sum below \$15.00 multiplied by the number of Active Members, additional assessments of \$30.00 must be made upon all the Association's Active Members.

The affairs of the Association are managed by a Board of Directors (the Board). Responsibilities of the Board include electing Association officers, determining benefit eligibility, and adopting resolutions amending the Bylaws and Articles of Incorporation. Following the Board's adoption of a resolution it is submitted for a vote at the annual meeting of the Association members. A two-thirds vote of Active Members present is required for approval. Only Active Members have voting rights. Members of the Board are elected by the Association's Active Members. The Bylaws provide for twenty-five directors, a majority of which must be Active Members.<sup>4</sup> Sixteen directors must be Active Members and six directors must be Life and/or Contributing Members. The Chief of Police of the City of Richmond is designated as a member of the Board, ex officio. The Board elects the Association's President, Vice-President, Secretary, and Treasurer on an annual basis. The Bylaws require that the Secretary and Treasurer be Active Members of the Association. You have represented that the Association's current President and Vice-President are not Active Members or employees of the Bureau.

Title I of ERISA covers both employee welfare benefit plans and employee pension benefit plans. The term "employee welfare benefit plan" is defined by section 3(1) of ERISA to mean:

. . . any plan, fund, or program which was hereto-fore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or pro-gram was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarshipfunds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such

The term "employee pension benefit plan" is defined by section 3(2) of ERISA to mean:

. . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Under section 3(1) and (2) of ERISA, in order for a program of benefits to constitute an "employee welfare benefit plan" or an "employee pension benefit plan" within the meaning of ERISA, the program must be established or maintained by an employer, an employee organization, or both. Since there is no indication that the Association's benefit program was established or is maintained, wholly or partially, by the City of Richmond or any other employer, this letter will address only whether or not the Association is an employee organization.

Section 3(4) of ERISA defines the term "employee organization" the mean:

. . . any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

There is no indication in the information you submitted that the Association "exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships." Therefore, the Association would not be an employee organization within the meaning of the first part of the definition contained in section 3(4), i.e. that portion appearing before the semicolon. Section 3(4) of ERISA, however, defines the term "employee organization" to also include any employees' beneficiary association organized for the purpose, in whole or in part, of establishing an employee benefit plan.

Although ERISA does not define the term "employees' beneficiary association", the Department applies the criteria it developed for the same term under the Welfare and Pension Plans Disclosure Act (WPPDA), 29 U.S.C. §302 (1970) (repealed 1975) in determining whether a particular association or organization is an "employees' beneficiary association" within the meaning of ERISA section 3(4). Under these criteria, in order to conclude that an association or organization is an "employees' beneficiary association" within the meaning of ERISA section 3(4), the Department must find that:

- 1) membership in the association is conditioned on employment status -- for example, membership is limited to employees of a certain employer or union;
- 2) the association has a formal organization, with officers, bylaws or other indications of formality;
- 3) the association generally does not deal with employers (as distinguished from organizations described in the first part of the definition of "employee organization", e.g., labor union); and
- 4) the association is organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

Pursuant to the first criterion, members, as participants in the association, must share a commonality of interest with respect to their employment relationships, e.g., employees of a single employer or members of one union. The requirement of employee participation means that the functions and activities of the organization are in fact controlled by its members, either directly or through the regular election of directors, officers, etc.

Based on your representations and the Association's Articles of Incorporation and Bylaws, there is no question that the Association meets the second, third and fourth criteria: (1) the Association has a formal organization with a board of directors, officers, articles of incorporation and bylaws; (2) the Association does not deal with employers; and (3) the Association was organized to provide pensions and funeral expenses. Moreover, as discussed below, it is the view of the Department that the Association also meets the first criterion.

In asserting that the Association is not an employees' beneficiary association, you contend that membership in the Association is open to any member of the public in view of the Contributing Member eligibility requirement. For purposes of ERISA §3(4) and the above criteria, however, the Association's membership is composed solely of employees of the Bureau who are police officers. Although individuals who are not Bureau employees provide the Association with financial support (for which they receive the designation "Contributing Member") and may have some involvement in its operation, control of the Association is retained by the Bureau employees who are Active Members. Bureau employees, as Active Members, possess the exclusive right to vote on matters brought before the membership at the Association's annual meeting. They elect the directors who serve on the Board and vote to approve or disapprove Board resolutions amending the Association's Bylaws and Articles of Incorporation. Their control of the Association is further assured by a requirement in the Bylaws that a majority of the directors be Active Members. Participation in the Association by individuals who are not Bureau employees is limited to making financial contributions and holding office upon election by the Active Members. Unlike true community organizations, the Association is not controlled by community members, but by employees of one employer, the Bureau. Moreover, the Association's Active Members are the only individuals entitled to receive benefits provided by the Association.

Accordingly, it is the position of the Department that the Association is an employees' beneficiary association and, therefore, an "employee organization" within the meaning of ERISA section 3(4).

You have also requested, in the event the Department is unable to conclude that the Association is not an "employee organization" within the meaning of section 3(4) of ERISA, that the Department find the Association's benefit program to be an "employee welfare benefit plan" and not an "employee pension benefit plan".

Based on your representations and the Association's governing documents, it is the view of the Department that the Association provides welfare benefits described in section 3(1) of ERISA and pension benefits described in section 3(2) of ERISA. Therefore, the Association's benefit program comprises both an "employee welfare benefit plan" and an "employee pension benefit plan" within the meaning of those ERISA sections, respectively.

Specifically, the Association's payments made to defray funeral expenses of active and retired Active Members and their spouses, are benefits provided "in the event of death" within the meaning of ERISA section 3(1). In addition, by the express terms of the Bylaws the Association also provides pensions to Active Members who retire after 20 years of service and Association membership or because of sickness or injury and, thus, "provides retirement income to employees" within the meaning of ERISA section 3(2). Moreover, the Articles of Incorporation state that one of the purposes of the Association is to accumulate a fund to provide pensions to members of the Association who are retired from the Bureau.

The provision of the benefit is contingent upon the employee's retirement from the Bureau and provides income to the employee during his or her period of retirement. Although the Department has identified certain programs in regulation 29 C.F.R. 2510.3-2 which will not be considered to constitute employee pension benefit plans under Title I of ERISA, the benefits provided by the Association upon an Active Member's retirement do not appear to fall within any of the types of programs identified in the regulation.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle  
Director of Regulations  
and Interpretations

<sup>1</sup> You advise that in 1989 the Association had 868 members: 279 Active Members (i.e. Richmond police officers) and 588 Contributing Members. At the time of your request less than one-half of the members of the regular police force were Active Members of the Association.

<sup>2</sup> In January of each year the Board estimates the number of persons who will be eligible for pensions during the forthcoming year and divides that number into the figure representing ninety percent of the net income produced by the pension fund during the preceding year. The resulting figure is the amount to which each eligible pensioner will be entitled during the forthcoming year.

<sup>3</sup> You advise that the Association's income is derived largely from the investment of the funds that have accumulated since the Association's inception in 1898. During 1989, the fund derived \$1,042,152 from plan investments. The same year the Association collected \$31,317 from membership dues (\$21,309 from Contributing Members and \$10,008 from Active Members).

<sup>4</sup> Article III of the Articles of Incorporation provides that the affairs of the Association are to be managed by a Board of Directors, composed of not less than three directors or such greater number as fixed by the Bylaws. It also calls for qualifications for directors to be fixed by the Bylaws.